

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2023

Public Authority: Sandwell Metropolitan Borough Council
Address: Sandwell Council House
PO Box 2374
Oldbury
Sandwell
West Midlands B69 3DE

Decision (including any steps ordered)

1. The complainant requested information from Sandwell Metropolitan Borough Council ("the public authority") about the expenses payments made to a particular contracted individual. The Commissioner's decision is that the Council is not entitled to rely on section 40(2) of FOIA to withhold that part of the requested information that this decision notice relates to.
2. The Commissioner requires the public authority to take the following steps:
 - Disclose the withheld information, about expenses under £500, to the complainant.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

4. On 29 June 2022, the complainant wrote to the public authority requesting information about a particular contractor, as follows:

"On a date prior to 24th August, 2021, [redacted] and [redacted] took it upon themselves to create a new "Interim" post of "[redacted]", which was duly given to [redacted], a personal associate and friend of [redacted], who publicly provides [redacted] address as being in [redacted] (although [redacted] also has known London connections).

Request One - [redacted] states that the post was created following a "discussion" between himself and [redacted]. Please provide all documents relating to the criteria for creating the post and the minutes of this discussion plus the date and location of the same.

Request Two - please disclose each and every communication between [redacted] and [redacted] and each and every communication between [redacted] and any other Councillor or Employee of SMBC - including, of course, the HR Department - relating to this post and candidate selection process prior to the appointment of [redacted].

[redacted] states that the post was created as an Interim Post so that he could use his delegated powers to avoid having to seek approval via the "appropriate Committee".

Request Three - please disclose the copy of the document wherein [redacted] exercised his "delegated power". (I assume this will show the relevant power [redacted] exercised. If not, please provide.)

[redacted] states that the post was not advertised but that SMBC sought applicants for the post via the LGA, WME and "other recruitment agencies" [hereinafter "the Organisations"]

Request Four - provide the full job description and all other communications passing between SMBC and the organisations - particularly the LGA - in respect of the recruitment process. What steps did SMBC take to ensure that it complied with its own legal obligations pursuant to the Equality Act 2010. What were the terms agreed for payment of the various organisations and were all the organisations officially accepted as SMBC suppliers via framework or other agreements? Please also state whether, at this initial stage, the pay was to be via the normal SMBC/PAYE system or via IR35?

[redacted] claims that appointment of [redacted] followed a "competitive process" but says that only one organisation - the LGA -

put forward a candidate and only one candidate was interviewed, namely [redacted].

Request Five - In Request Two above I requested ALL documentation and, for the avoidance of any doubt this includes, especially, ALL communications with the LGA. Further, noting the recruitment process was allegedly outsourced please describe the actual "competitive" process and produce the evidence thereof. Please name the person or persons at the LGA who proposed [redacted] for this position.

[redacted] states that [redacted] was only interviewed by [redacted] and the "[redacted]". [redacted] was appointed on an interim basis to be paid via the IR35 system as a self-employed person.

Request Six - what is the name of the [redacted] involved in the interview? I am aware of privacy provisions but where - in general terms such as "London" or "[redacted]" - did [redacted] give as [redacted] address? Please disclose the full job description and all terms provided to [redacted] and the proposed duration of the contract. Please confirm any specified hours when [redacted] is contacted to physically be in Sandwell. Was the post specified as a politically-restricted one? All payments over £500 to contractors must be shown on a monthly list which is publicly available but I cannot see details of any such payments. In which name are the payments being made to [redacted] and via which area of the Council? In any event, as not all payments may be shown on the list please state all payments made to [redacted] to date. If, in addition to hourly rate payments [redacted] is entitled to any other sums e.g. for travel, accommodation please state these amounts separately. Has the "Interim" Contract been extended since inception and, if so, please provide the full terms of the extension(s) and the current proposed termination date. For 4 how long can the contract run before it ceases to be "interim" and requires Committee approval?

May I respectfully remind you that many of the above requests were submitted over 6 months ago in writing to [redacted]. As this is simply a matter of supplying information in a single file I trust it will be dealt with in a timely manner and, in any event, within the statutory timescale."

5. The public authority responded on 24 August 2022, providing some limited information, advising that some of the information requested was not held and with regard to parts of the request asking for information about the contractor's address, contract terms and remuneration, the public authority stated that it was withholding the information under section 40(2) of FOIA as it constituted third party data and would:

"... breach the fair processing principle contained in the Data Protection Act 2018 (DPA), where it would be unfair to that person and is confidential. [redacted] is an interim employee and should not expect this level of personal information to be made available to the public. The public interest in this information falls in support of this exemption being applied".

6. Following an internal review, the public authority wrote to the complainant on 20 September 2022, upholding its original decision.
7. The complainant then wrote to the public authority on 30 September 2022, to advise it:

"I am now reporting this matter to the Information Commissioner as your response has been wholly unsatisfactory.

In the meantime may I remind you that you [redacted] is a contractor and all payments exceeding £500 have to be disclosed by SMBC by law."

Scope of the case

8. The complainant contacted the Commissioner on 30 September 2022, to complain about the way the entire request for information had been handled by the public authority.
9. On 8 December 2022, the Commissioner wrote to the public authority, asking it for a detailed explanation as to its handling of the whole of the information request.
10. The public authority responded to the Commissioner on 20 January 2023 and included within its submissions, was the following update:

"Firstly, I would like to provide an update in relation to question 6. I confirm that since the Internal Review was issued, the requester has been in contact with the Council specifically regarding the payments made to [redacted]. The Council has accepted that [redacted] role falls within the definition of a direct personal contract and as such,

payments to [redacted] above £500 should be published on its list of expenditure exceeding £500 in accordance with the Local Government Transparency Code 2014. On 4th November 2022, the Council updated the records on its website and provided the link and the details to the requester. The Council will continue to publish payments to [redacted], and others in [redacted] position, that amount to more than £500 in accordance with the Transparency Code. This is published on the Council's website ..."

11. On 31 January 2023, the Commissioner wrote to the complainant , outlining his preliminary findings and acknowledging that the public authority had now provided the complainant with details of any payments made to the contractor over £500. The complainant was advised that if they accepted the Commissioner's findings, then the case would be closed but if they wished to challenge any of the findings, then the Commissioner would issue a decision notice.
12. On 14 February 2023, the complainant wrote back to the Commissioner, detailing a particular part of the request that they wished the Commissioner to further consider, as follows:

"there is only a single issue now remaining to be dealt with and that relates to Part 6 of the initial request in respect of expenses payable to [redacted] ..."
13. This decision notice is, as requested by the complainant, therefore limited to the public authority's handling of the sixth part of the request and specifically that part of the request asking for information about expenses payments made to the contractor under £500.
14. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the information, about expenses under £500, under section 40(2) of FOIA.

Reasons for decision

Section 40 - personal information

15. This reasoning covers whether the Council was correct to apply section 40(2) of FOIA to the part of the request that this decision notice is about.¹

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/40>

16. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. In this case, the Commissioner is satisfied that the withheld information is personal data. This is because the request asked for details of payments made to a named living individual and it is therefore information relating to an identifiable person.
18. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
19. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether these interests override the rights and freedoms of the individuals whose personal information it is.
20. The complainant argues that it is of wider public interest that all of the contractor's expenses are made public given that they are funded by the taxpayer and if the public authority is only required to publish payments over £500 then they "might seek to "split" payments to avoid having to disclose them publicly". The complainant states "there is no bar on the Council disclosing these payments unless there are privacy reasons against this" and puts forward that some other councils do publish such information.
21. The complainant is further concerned that the appointed contractor was the only individual to be considered for what is a very senior role at the public authority and is believed to have stated publicly that they live some significant distance away from where the public authority is based, thus incurring increased travel expenses.
22. The complainant further argues that the contractor chose to be paid as an independent contractor for their own benefit and accordingly should have had an expectation that details of their expenses would be made public.
23. The Commissioner considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that legitimate interest.
24. It is necessary to balance the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects. In doing so, it is necessary to consider the impact of disclosure.

25. In the Commissioner's view, a key issue when considering the balancing test is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individuals, taking into account whether or not they have consented to its disclosure.
26. In this case, the public authority has explained to the Commissioner that it considers that it:

"...has disclosed a sufficient amount of information about the role and the payments to [redacted] to comply with the Transparency Code and to meet the public interest.

The level of detail requested in Request 6 goes beyond what is required and disclosure of the information would breach [redacted]'s data protection rights...

[redacted] has a reasonable expectation that this information would not be disclosed by the Council.

The Council has asked [redacted] whether [redacted] is willing to provide the information that has been requested and [redacted] has not provided [redacted] consent. [redacted] is particularly concerned that the information requested can identify [redacted] whereabouts, not only the area in which [redacted] lives, but also [redacted] whereabouts when [redacted] is travelling to and from work. The terms of [redacted] contract and [redacted] expense claims will potentially provide that information ..."

27. In this case the Commissioner considers that the contractor's position is that of a senior paid public official and, as their remuneration package is paid for by public taxes, there is a legitimate interest of accountability in making public what payments are made to the contractor, including expenses below £500 and there should be an expectation that this information would be made public. It is considered that details of the payments made could be published without disclosing details of the contractor's residence or whereabouts. The Commissioner sees no material difference between releasing information about a payment either over or under £500 in value.
28. In this instance, the Commissioner has determined that there is a valid basis for processing and so disclosure of the information, about expenses under £500, would be lawful. The public authority was therefore not correct to apply section 40(2) of FOIA to this request.

Right of appeal

29. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF